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FOR THE DISTRICT OF SOUTH CAROLINA

2008 AUG -4 P 3:4

Timothy A. Rice a/k/a Timmy)	C. A. No. 2:08-1390-GRA-RSC
Allen Rice,)	
)	
Petitioner,)	
)	
-versus-)	<u>REPORT AND RECOMMENDATION</u>
)	
M. L. Rivera, Warden,)	
)	
Respondent.)	

The Petitioner, Timothy A. Rice, a federal prisoner, and the Respondent Warden M. L. Rivera, who has custody of the Petitioner, agree that this petition is properly before the court under 28 U.S.C. § 2241.¹ The Petitioner challenges on claims of actual innocence his conviction under 18 U.S.C. § 924(c)(1).

Likewise the parties agree that the petition should be granted because, "the facts and evidence do not support a conviction under § 924(c)(1)." Respondent's Brief Pg. 7.

Accordingly, it is recommended that the petition herein be granted, and the conviction for violation of 18 U.S.C. § 924(c)(1), Count 5 of Indictment No. 90-310, be vacated. To the extent vacating the § 924(c)(1) conviction effects the computation of the Petitioner's single aggregate term, the Bureau

¹ The Petitioner has brought two previous petitions one under 28 U.S.C. § 2255, 7:01-cv-2867-GRA, which was dismissed as untimely, and one under 28 U.S.C. § 2241, 2:03-1586-GRA, which was treated as a mislabeled § 2255 and dismissed as untimely.

of Prisons should be directed to recompute the Petitioner's sentence.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert S. Carr". The signature is fluid and cursive, with the first name "Robert" and last name "Carr" being clearly legible.

Robert S. Carr
United States Magistrate

Charleston, South Carolina

August 4, 2008

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Court Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. In the absence of a timely filed objection, a district court judge need not conduct a de novo review, but instead must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005).

Specific written objections must be filed within ten (10) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three (3) days for filing by mail. Fed. R. Civ. P. 6(a) & (e). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
P.O. Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985).